

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 08-7232-VBF(RC_x)**

Dated: **November 19, 2009**

Title: Village Pizzeria Enterprises -v- Steven M. Cohen

PRESENT: HONORABLE VALERIE BAKER FAIRBANK, UNITED STATES DISTRICT JUDGE

Rita Sanchez
Courtroom Deputy

Rosalyn Adams
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

ATTORNEYS PRESENT FOR DEFENDANTS:

Lane E. Bender

John A. Peterson
Thomas M. O'Leary

PROCEEDINGS: FINAL PRE-TRIAL CONFERENCE

Case called, and counsel make their appearance.

As stated on the record, the Court reviews the Parties' various pre-trial filings.

SUMMARY OF UPCOMING DEADLINES: As reflected in the reporter's notes and explained below, the Court sets the following deadlines before trial:

Jury Instructions	Wednesday, November 25, 2009, 12:00 p.m.
Plaintiff's Brief on Submitted Matter	Wednesday, November 25, 2009, 12:00 p.m.
Defendant's Response to Plaintiff's Brief	Monday, November 30, 2009

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Exhibit Notebooks

The Court orders the Parties to submit three exhibit notebooks by the first day of trial, December 8, 2009.

Voir Dire and Jurors

As reflected on the record, the Parties agree to empanel 8 jurors for this trial. The Parties also discuss voir dire. The Court will perform voir dire, and will permit the Parties to supplement questions if desired. Each side will have 3 peremptory challenges (see 28 U.S.C. § 1870).

Jury Instructions

The Plaintiff's proposed jury instructions (dkt. #113) do not comply with the Court's Scheduling and Case Management Order ¶ 5 (dkt. #26). The Parties provide the Court with a more complete set of instructions, which still do not comply with the Scheduling and Case Management Order, Federal Rule of Civil Procedure 51, and Local Rule 51-2.

The Court orders the Parties to submit instructions that comply with the appropriate authorities no later than Wednesday, November 25, 2009, at 12:00 p.m.

Witnesses and Timing

The Court reviews the witness list. The Parties agree that witnesses are to be called only once.

With respect to time parameters, each Party will have 6 hours for all of its presentation of evidence. The Court will advise the jury about the time limits.

Causes of Action

As reflected in the reporter's notes, the Court entertains discussion on which causes of action and affirmative defenses are to be tried before the jury. Plaintiff states that causes of action 1, 2, 3, 5, and 6 of the First Amended Complaint should be tried before a jury, and causes of action 4 and 7 should be tried before the Court. Defendant states that it withdrew all of its affirmative defenses except fair use, as reflected in the Final Pretrial Conference Order, and the fair use defense should be tried before the jury. Because the Plaintiff's First Amended Complaint and the Proposed Pretrial Conference Order are not entirely clear about which causes of action properly request a

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jury trial, the Court takes this matter under submission, and orders the Parties to submit briefing on this matter (described below).

Plaintiff also states that it seeks punitive damages only for cause of action 6 of the First Amended Complaint (California Civil Code § 3344). The Court, with consent of the Parties, bifurcates this trial. The first phase will deal with liability, damages, and basis for punitive damages. If the jury makes the requisite findings, then the jury will determine the amount of punitive damages and will be presented with the appropriate evidence.

Motions in Limine

As set forth in the reporter's notes, the Court rules on the Plaintiff's Motions in Limine.

The Court GRANTS Motion in Limine No. 1 (dkt. #96), to exclude testimony and report of Defendant's Expert David Weiner, on grounds of Federal Rule of Civil Procedure 26, 37, and Federal Rule of Evidence 702. Counsel for Defendant requests that the expert testimony of David Weiner should be admitted only with respect to the issue of damages and net loss, though such issue was not in Mr. Weiner's expert report disclosed to the Plaintiff pursuant to Federal Rule of Civil Procedure 26. The Court denies Defendant's request to supplement Mr. Weiner's expert declaration and report, finding that the request is not timely or adequately supported.

The Court DENIES Motion in Limine No. 2 (dkt. #97), to exclude the 1994 Agreement. See Fed. R. Evid. 401.

Trial Briefs

The Court does not require trial briefs, but should a Party wish to file one, the deadline is Friday, December 4, 2009.

Final Pre-Trial Conference Order

The Court signs the Final Pre-Trial Conference Order, subject to the amendment that the trial will last no longer than 5 days.

Matter under Submission

The Court, for reasons described above and as reflected in the reporter's notes, requires focused

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briefing on the following issues:

- 1) Whether Plaintiff is entitled to try causes of action 1, 2, and 3 in the First Amended Complaint before the jury;
- 2) Does Paragraph 6 of the First Amended Complaint Prayer for Relief, which refers to 15 U.S.C. § 1117(a) and (b), adequately provide notice of a damages claim to Defendant? (Similarly, does the Pretrial Conference Order, submitted by the Parties and signed by the Court, provide adequate notice?)
- 3) Does 15 U.S.C. § 1117(a) and (b), referenced in Paragraph 6 of the First Amended Complaint Prayer for Relief, entitle Plaintiff to a jury trial on causes of action 1, 2, and 3?
- 4) If damages are not adequately alleged, is Plaintiff making a motion for leave to amend its First Amended Complaint?
- 5) Would the Defendant be prejudiced by the Plaintiff's seeking damages and a jury trial on causes of action 1, 2, and 3? If so, why?
- 6) With respect to the issue of damages, Counsel should address the relevance of Federal Rule of Civil Procedure 26(a)(1)(A)(iii).

Briefing is limited to 10 pages.

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